

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: MDL Docket No 06-1791 VRW
NATIONAL SECURITY AGENCY ORDER
TELECOMMUNICATIONS RECORDS
LITIGATION

This order pertains to:

Al-Haramain Islamic Foundation et
al v Bush et al (C-07-0109 VRW),
_____/

The court of appeals has remanded the above case for this court "to consider whether FISA preempts the state secrets privilege and for any proceedings collateral to that determination." Al-Haramain Islamic Foundation, Inc v Bush, 507 F3d 1190, 1206 (9th Cir 2007).

Plaintiffs' complaint alleges six causes of action of which the first is under the Foreign Intelligence Surveillance Act, 50 USC §§ 1801-71 ("FISA"). In that claim, plaintiffs allege in pertinent part:

Defendants' engagement in electronic surveillance to monitor conversations between and among plaintiffs as targeted persons without obtaining prior court authorization, and defendants' subsequent use of the information obtained against plaintiffs, is in violation of the civil and criminal provisions of

1 FISA. As a result, all evidence obtained by this
2 illegal surveillance must be suppressed pursuant to
3 50 USC § 1806(g). Further, plaintiffs are entitled
to liquidated and punitive damages pursuant to 50 USC
§ 1810.

4 Complaint, Al-Haramain Islamic Foundation, Inc v Bush, No C 06-0274
5 KI Doc # 1 ¶ 27, United States District Court for the District of
6 Oregon, filed February 28, 2006.

7 Plaintiffs' other causes of action are for alleged
8 violations of the "separation of powers" principle in the
9 Constitution, the First, Fourth and Sixth amendments and the
10 International Covenant on Civil and Political Rights. But it is to
11 plaintiffs' FISA claims that the parties have directed their
12 arguments and the court of appeals its attention. All of
13 plaintiffs' claims would appear to depend on FISA. This order,
14 therefore, devotes itself exclusively to FISA and the question
15 posed by the court of appeals remand.

16 For the reasons stated herein, the court has determined
17 that: (1) FISA preempts the state secrets privilege in connection
18 with electronic surveillance for intelligence purposes and would
19 appear to displace the state secrets privilege for purposes of
20 plaintiffs' claims; and (2) FISA nonetheless does not appear to
21 provide plaintiffs a viable remedy unless they can show that they
22 are "aggrieved persons" within the meaning of FISA. The lack of
23 precedents interpreting the remedial provisions of FISA, the
24 failure of the parties to consider the import of FISA preemption
25 and the undeveloped factual record in this case warrant allowing
26 plaintiffs to attempt to make that showing and, therefore, support
27 dismissal of the FISA claim with leave to amend.

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I

Plaintiffs are the Al-Haramain Islamic Foundation, Inc, an Oregon non-profit corporation, and two of its individual attorneys, Wendell Belew and Asim Ghafoor, both United States citizens ("plaintiffs"). Plaintiffs brought suit in the United States District Court for the District of Oregon against "George W Bush, President of the United States, National Security Agency, Keith B Alexander, its Director, Office of Foreign Assets Control, an office of the United States Treasury, Robert W Werner, its Director, Federal Bureau of Investigation, Robert S Mueller, III, its Director" ("defendants"). Complaint at 1.

Along with their complaint, plaintiffs filed under seal a copy of a classified document that had inadvertently been disclosed by defendant Office of Foreign Assets Control ("OFAC") to counsel for Al-Haramain as part of a production of unclassified documents relating to Al-Haramain's potential status as a "specially designated global terrorist." Al-Haramain Islamic Foundation, Inc v Bush, 451 F Supp 2d 1215, 1218 (D Or 2006).¹ This document, which has proven central to all phases of this litigation including the issues now before this court, will be referred to herein as the "Sealed Document."

The complaint alleges that the National Security Agency ("NSA") conducted warrantless electronic surveillance of communications between a director or directors of Al-Haramain and

¹ On June 19, 2008, the United States Department of the Treasury designated "the entirety" of the Al-Haramain Islamic Foundation including its headquarters in Saudi Arabia, having previously designated branch offices in thirteen individual countries, including the United States. See <http://www.treasury.gov/press/releases/hp1043.htm>.

1 the two attorney plaintiffs without regard to the procedures
2 required by FISA, that the NSA turned over logs from this
3 surveillance to OFAC and that OFAC then consequently froze
4 Al-Haramain's assets. Id.

5 The Oregon district court entertained motions by the
6 Oregonian Publishing Company to intervene in the suit and unseal
7 records, by plaintiffs to compel discovery of information about the
8 electronic surveillance of plaintiffs and regarding the reasons for
9 classifying the Sealed Document and by defendants to prevent
10 plaintiffs' access to the Sealed Document and to dismiss or, in the
11 alternative, for summary judgment based on the state secrets
12 privilege.

13 On September 7, 2006, the Oregon district court issued a
14 lengthy opinion and order. Several points in that order remain
15 salient to the matter now before this court. The court held that
16 "plaintiffs need some information in the Sealed Document to
17 establish their standing and a prima facie case, and they have no
18 other available source for this information." Id at 1221. It also
19 held that given defendants' many public acknowledgments of the
20 warrantless electronic surveillance program beginning in 2005, the
21 program was not a secret. Id at 1221-23. It rejected defendants'
22 contention that litigation concerning the program would necessarily
23 compromise national security and held that, contrary to defendants'
24 contention, "the very subject matter of the case" was not a state
25 secret. It ordered plaintiffs to deliver to the court all copies
26 of the Sealed Document in their possession or under their control,
27 to be deposited in the sealed compartmentalized information
28 facility ("SCIF") provided by the Portland FBI office for the

1 storage of classified documents. Id at 1229. It denied without
2 prejudice plaintiffs' request for discovery and denied the
3 Oregonian's motion to unseal records. Id at 1232.

4 The Oregon district court ruled that there was "no
5 reasonable danger that the national security would be harmed if it
6 is confirmed or denied that plaintiffs were subject to
7 surveillance, but only as to the surveillance event or events
8 disclosed in the Sealed Document" while also ruling that
9 "disclosing whether plaintiffs were subject to any other
10 surveillance efforts could harm the national security." Id at 1224
11 (emphasis added). On the rationale that plaintiffs should be
12 allowed to proceed based on the surveillance already disclosed to
13 them, substantiated by evidence in a form yet to be determined, the
14 court denied defendants' motion to dismiss: "plaintiffs should have
15 an opportunity to establish standing and make a prima facie case,
16 even if they must do so in camera." Id at 1226-27.

17 The Oregon district court declined to reach one further
18 issue presented to it by the parties—the issue this court is
19 charged to decide on remand from the court of appeals:

20 Plaintiffs argue * * * that FISA preempts the
21 state secrets privilege. Specifically, plaintiffs
22 argue that FISA vests the courts with control over
23 materials relating to electronic surveillance,
24 subject to "appropriate security procedures and
protective orders." 50 USC §1806(f). As a
result, plaintiffs contend that Section 1806(f)
renders the state secrets privilege superfluous in
FISA litigation.

25 Id at 1229.

26 The Oregon district court summarized defendants' argument
27 to be that section 1806(f) only benefits the government—that it
28 exists, in essence, for the sole purpose of providing for in camera

1 review of documents and information the government intends to use
2 against a criminal defendant. The Oregon district court quoted
3 section 1810, FISA's civil liability provision, together with
4 FISA's definition of an "aggrieved person" entitled to sue under
5 section 1810 (see *infra* Part III) and observed: "[t]o accept the
6 government's argument that Section 1806(f) is only applicable when
7 the government intends to use information against a party would
8 nullify FISA's private remedy and would be contrary to the plain
9 language of Section 1806(f)." *Id.* at 1231 (emphasis added).

10 Concluding that "[t]he question becomes then whether
11 Section 1806(f) preempts the state secrets privilege," the Oregon
12 district court wrote, "I decline to reach this very difficult
13 question at this time, which involves whether Congress preempted
14 what the government asserts is a constitutionally-based privilege."
15 *Id.* The Oregon district court certified its other rulings for
16 immediate appeal. Defendants appealed and, during the pendency of
17 the appeal, this case was reassigned by the Judicial Panel on
18 Multidistrict Litigation ("MDL") to the undersigned.

19 The court of appeals granted interlocutory review and
20 consolidated the appeal in this matter with the interlocutory
21 appeal from an order by the undersigned concerning the state
22 secrets privilege and related issues in Hepting v AT&T Corp, 439 F
23 Supp 2d 974 (N D Cal 2006). The cases were argued on the same day
24 before the same panel, but the court of appeals later determined
25 that "the claimed facts and circumstances of each case are
26 distinct" and entered an order concurrently with the opinion in the
27 instant matter stating that "the cases are no longer consolidated
28 for any purpose." 507 F3d at 1196 n 3. The court of appeals

1 subsequently issued an order withdrawing the submission of the
2 Hepting appeal; that matter remains on appeal. Order, Hepting v
3 AT&T Corporation, Inc, No 06-17137 Doc #128, United States Court of
4 Appeals for the Ninth Circuit, filed November 16, 2007.

5 In its opinion in this case, the court of appeals
6 determined that review of a district court's rulings on the state
7 secrets privilege should be de novo, having previously only
8 "intimated" as much. 507 F3d at 1196. After considering the
9 history of the state secrets privilege, the court of appeals
10 considered three contentions by the government on appeal: (1) the
11 very subject matter of the litigation is a state secret; (2)
12 Al-Haramain cannot establish standing to bring suit, absent the
13 Sealed Document; and (3) Al-Haramain cannot establish a prima facie
14 case, and the government cannot defend against Al-Haramain's
15 assertions, without resorting to state secrets. In a footnote, the
16 court of appeals observed that the third issue had not been
17 addressed by the district court. 507 F3d at 1197 & n 4.

18 As to the first issue, the court of appeals made note of
19 the government's extensive, intentional public disclosures by
20 President George W Bush, Attorney General Alberto Gonzales and
21 especially General Michael V Hayden, which had "provided to the
22 American public a wealth of information about the [Terrorist
23 Surveillance Program]," and declined to follow either Kasza v
24 Browner, 133 F3d 1159 (9th Cir 1998) or El-Masri v United States,
25 479 F3d 296 (4th Cir 2007), both cases in which dismissals based on
26 the state secrets privilege were affirmed on appeal. The court
27 held that while Al-Haramain's case involved privileged information,
28 "that fact alone does not render the very subject matter of the

1 action a state secret" and affirmed the district court's denial of
2 dismissal on that basis. 507 F3d at 1201.

3 Before turning to the second issue on appeal, the court of
4 appeals next considered whether the state secrets privilege had been
5 properly invoked and determined that it had. Based on that
6 determination, the court of appeals concluded that Al-Haramain's
7 "showing of necessity" or "admittedly substantial need for the
8 document to establish its case," United States v Reynolds, 345 US 1,
9 10 (1953), required an in camera review of the Sealed Document. 507
10 F3d at 1203. After describing in general terms the nature of the in
11 camera review, the court wrote: "We are satisfied that the basis
12 for the privilege is exceptionally well documented" and that
13 disclosure of "information concerning the Sealed Document and the
14 means, sources and methods of intelligence gathering in the context
15 of this case would undermine the government's intelligence
16 capabilities and compromise national security." 507 F3d at 1204.
17 The court of appeals then held that the Oregon district court's
18 compromise allowing plaintiffs to submit sealed affidavits attesting
19 to the contents of the document from their memories was "contrary to
20 established Supreme Court precedent"— specifically Reynolds, 345 US
21 at 11—and wrote that "the state secrets privilege * * * does not
22 lend itself to a compromise solution in this case." Id.

23 Regarding use of the Sealed Document in this litigation,
24 the court of appeals held: "The Sealed Document, its contents, and
25 any individuals' memories of its contents, even well-reasoned
26 speculation as to its contents, are completely barred from further
27 disclosure in this litigation by the common law state secrets
28 privilege." Id.

1 Having thus dealt with the first issue, the court of
2 appeals turned to the government's second issue on appeal—Al-
3 Haramain's standing—and held that plaintiffs could not establish
4 standing to proceed with their lawsuit without the Sealed Document
5 because they could not establish a "concrete and particularized"
6 injury-in-fact under the principles of Lujan v Defenders of
7 Wildlife, 504 US 555 (1992): "Al-Haramain cannot establish that it
8 has standing, and its claims must be dismissed, unless FISA
9 preempts the state secrets privilege." 507 F3d 1205.

10 Citing Singleton v Wulff, 428 US 106 (1976), that a court
11 of appeals should not ordinarily consider an issue not ruled on in
12 the district court, the court of appeals declined to decide whether
13 FISA preempts the state secrets privilege. Instead, writing that
14 "the FISA issue remains central to Al-Haramain's ability to proceed
15 with this lawsuit," it remanded the case to this court to consider
16 that question "and for any proceedings collateral to that
17 determination." 507 F3d at 1206. The court of appeals did not
18 consider the consequences of FISA preempting the state secrets
19 privilege and the implications of such a determination for possible
20 use in this litigation of the Sealed Document.

21 In accordance with orders entered at a status conference
22 in this matter on February 7, 2008, defendants filed a second motion
23 to dismiss plaintiffs' claims on the grounds that FISA does not
24 preempt the state secrets privilege and that plaintiffs lack
25 standing to seek prospective relief and are barred from seeking
26 relief under FISA by the doctrine of sovereign immunity. Doc

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1 #432/17.² Plaintiffs filed an opposition (Doc #435/20) and the
2 court accepted two amicus briefs, one by plaintiffs in other MDL
3 cases and the other by certain telecommunications defendants in the
4 MDL cases (Doc ##440/23 & 442/25).

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6 II

7 A

8 The enactment of FISA was the fruition of a period of
9 intense public and Congressional interest in the problem of
10 unchecked domestic surveillance by the executive branch. In 1975,
11 Congress formed the Senate Select Committee to Study Governmental
12 Operations with Respect to Intelligence Activities known as the
13 "Church Committee" for its chairman, Senator Frank Church, to
14 investigate alleged intelligence-gathering abuses in the domestic
15 sphere by the various executive branch agencies with intelligence-
16 gathering authority. The Church Committee's two-volume final report
17 was transmitted to Congress in 1976; the following passage from
18 among the report's conclusions and recommendations illustrates the
19 tone and substance of the findings:

20 Our findings and the detailed reports which
21 supplement this volume set forth a massive record of
22 intelligence abuses over the years. Through the use
23 of a vast network of informants, and through the
24 uncontrolled or illegal use of intrusive
25 techniques—ranging from simple theft to
26 sophisticated electronic surveillance—the Government
27 has collected, and then used improperly, huge amounts
28 of information about the private lives, political
beliefs and associations of numerous Americans.

27 ² Citations to documents in the docket of this case will be cited both
28 to the MDL docket (No M 06-1791 VRW) and to the individual docket (No C 07-
0109) in the following format: Doc #xxx/yy.

1 Senate Select Committee to Study Governmental Operations with
2 Respect to Intelligence Activities ("Church Committee Report") Book
3 II: Intelligence Activities and the Rights of Americans, S Rep No
4 94-755, 290 (1976).

5 The Church Committee Report further concluded that
6 "intelligence activities have undermined the constitutional rights
7 of citizens and that they have done so primarily because checks and
8 balances designed by the framers of the Constitution to assure
9 accountability have not been applied." Id at 289. The Church
10 Committee Report set the stage for Congress to begin the effort to
11 enact comprehensive legislation to address the intelligence-related
12 abuses identified therein. That effort began in the very next
13 Congress.

14 In 1978, after the introduction of several competing bills
15 and extensive deliberation and debate, Congress enacted FISA. To
16 summarize FISA's provisions in a brief and general manner, FISA set
17 out in detail roles for all three branches of government, providing
18 judicial and congressional oversight of the covert surveillance
19 activities by the executive branch combined with measures to
20 safeguard secrecy necessary to protect national security. FISA set
21 out procedures by which the executive branch could undertake
22 electronic surveillance and physical searches for foreign
23 intelligence purposes in the domestic sphere. Any application for
24 electronic surveillance was required, among other things, to
25 establish probable cause justifying the surveillance, describe the
26 information being sought and aver that the information could not be
27 obtained through normal investigative techniques. 50 USC § 1804(a).

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1 FISA also provided for the creation of two courts staffed
2 by federal judges to conduct sealed proceedings to consider requests
3 by the government for warrants to conduct foreign intelligence
4 surveillance. 50 USC §§ 1803(a), (b). The Foreign Intelligence
5 Surveillance Court ("FISC") was established to consider applications
6 in the first instance, with the Court of Review reviewing denials of
7 applications by the FISC and the Supreme Court acting as the final
8 appellate court. Id. FISA allowed the United States attorney
9 general to authorize electronic surveillances in emergency
10 situations without FISC approval if the appropriate judge was
11 informed and an application made within twenty-four hours after
12 authorization. 50 USC §§ 1802, 1805(f).

13 FISA provided for continuing oversight of the government's
14 foreign intelligence surveillance activities by Congress, requiring
15 regular, highly detailed reports to Congress of all actions taken
16 under FISA. E g, 50 USC §§ 1808, 1826. The reporting requirements
17 are discussed in more detail in Part III A below.

18 Of special relevance to the court's present inquiry,
19 Congress included in the FISA bill a declaration that the FISA
20 regime, together with the Omnibus Crime Control and Safe Streets Act
21 of 1968 codified at chapter 119 of Title 18 of the United States
22 Code, 18 USC §§ 2510-22 ("Title III"), were to be the "exclusive
23 means" by which domestic electronic surveillance for national
24 security purposes could be conducted:

25 procedures in this chapter or chapter 121 and the
26 Foreign Intelligence Surveillance Act of 1978 shall be
27 the exclusive means by which electronic surveillance,
28 as defined in section 101 of such Act, and the
interception of domestic wire, oral, and electronic
communications may be conducted.

1 18 USC § 2511(2)(f). This provision and its legislative history
2 left no doubt that Congress intended to displace entirely the
3 various warrantless wiretapping and surveillance programs undertaken
4 by the executive branch and to leave no room for the president to
5 undertake warrantless surveillance in the domestic sphere in the
6 future.

7 The Report of the Senate Select Committee on Intelligence
8 stated that the FISA bill's "exclusive means" statement "puts to
9 rest the notion that Congress recognizes an inherent Presidential
10 power to conduct such surveillances in the United States outside of
11 the procedures contained in chapters 119 and 120." Foreign
12 Intelligence Surveillance Act, S Rep No 95-701, 95th Cong 2d Sess
13 71, reprinted in 1978 USCCAN 3973, 4040. That report cited
14 Congress's authority over FISA's subject matter in Article I
15 section 8 of the Constitution and the power to "make all laws which
16 shall be necessary and proper for carrying into execution the
17 foregoing powers." US Const cl 1, 18. The report also both
18 discussed Justice Jackson's concurring opinion in Youngstown Sheet
19 and Tube Co v Sawyer, 343 US 579, 635 (1952) and included the
20 following passage from the opinion:

21 When the President takes measures incompatible with the
22 expressed or implied will of Congress, his power is at
23 its lowest ebb, for then he can rely only upon his own
 constitutional powers minus any constitutional power of
 Congress over the matter.

24 See also Foreign Intelligence Surveillance Act, H Conf Rep No 95-
25 1720, 95th Cong 2d Sess 35, reprinted in 1978 USCCAN 4048, 4064.
26 ("The intent of the conferees is to apply the standard set forth in
27 Justice Jackson's concurring opinion in [Youngstown Sheet & Tube].")

28 A lesser-known provision of FISA also expressly limited

1 presidential power to conduct foreign intelligence surveillance by
2 repealing 18 USC section 2511(3) which had provided:

3 Nothing in this chapter * * * shall limit the
4 constitutional power of the President to take such
5 measures as he deems necessary to protect the nation
6 against actual or potential attack * * * or to protect
7 national security against foreign intelligence
8 activities. * * * The contents of any wire or oral
9 communication intercepted by authority of the President
10 in the exercise of the foregoing powers may be received
11 in evidence in any trial hearing [sic], or other
12 proceeding only where such interception was reasonable,
13 and shall not be otherwise used or disclosed except as
14 is necessary to implement that power.

15 18 USC § 2511(3)(1976). The Report of the Senate Select Committee
16 on Intelligence explained that the repeal of this section
17 "eliminat[ed] any congressional recognition or suggestion of
18 inherent Presidential power with respect to electronic
19 surveillance." S Rep 95-701, 72.

20 In the floor debate on Senate Bill 1566, Senator Gaylord
21 Nelson related the history of the Senate's efforts to enact a
22 foreign intelligence surveillance law to curb the abuses reported by
23 the Church Committee; he noted that a "principal issue" with prior,
24 unsuccessful legislative proposals was the reservation or reference
25 to "inherent Presidential power," but that Senate Bill 1566 had no
26 such reservation or reference: "Once enacted, it would represent
27 the sole authority for national security electronic surveillance in
28 the United States." Foreign Intelligence Surveillance Act, S 1566,
95th Cong, 2d Sess, in 124 Cong Rec S 10903 (April 30, 1978).
Senator Nelson further stated: "Along with the existing statute
dealing with criminal wiretaps, this legislation blankets the field.
If enacted, the threat of warrantless electronic surveillance will
be laid to rest." Id.

B

"Preemption" usually refers to Congress asserting its authority under the Supremacy Clause to override state law that interferes with federal interests. In the present context, "preemption" refers to Congress overriding or replacing the interstitial lawmaking that judges create through federal common law. In Milwaukee v Illinois, 451 US 304, 314 (1980) the Supreme Court explained the latter type of preemption: "Federal common law is a 'necessary expedient' and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." The Court further explained that federal courts need not find a "clear and manifest purpose" to replace or displace federal common law as would be required for a determination that Congress had pre-empted state law because there are no corresponding concerns for "our embracing federal system, including the principle of diffusion of power * * * as a promoter of democracy." Id at 316-17. On the contrary, the Court noted that federal courts are not general common-law courts and do not possess "a general power to develop and apply their own rules of decision." Id at 312, citing Erie R Co v Tompkins, 304 US 64, 78 (1934). Federal common law applies "[u]ntil the field has been made the subject of comprehensive legislation." 451 US at 314.

In Milwaukee v Illinois, the Court held that the 1972 amendments to the Federal Water Pollution Control Act preempted the application of the common law of nuisance by federal courts in disputes over water pollution. In so holding, the Court looked to the legislative history, making special note of remarks by the Act's

1 sponsors, in determining that Congress's purpose was to establish an
2 "all-encompassing program of water pollution regulation" 451 US at
3 318. The Court noted that "[n]o Congressman's remarks were complete
4 without reference to the 'comprehensive' nature of the Amendments."
5 Id. "The establishment of such a self-consciously comprehensive
6 program by Congress * * * strongly suggests that there was no room
7 for courts to attempt to improve on that program with federal common
8 law." Id at 319.

9 Both the plain text and the legislative history make clear
10 that Congress intended FISA to "occupy the field through the
11 establishment of a comprehensive regulatory program supervised by an
12 expert administrative agency." Id at 317. Congress through FISA
13 established a comprehensive, detailed program to regulate foreign
14 intelligence surveillance in the domestic context. The
15 establishment of the specialized FISA courts specifically dedicated
16 to considering requests for foreign intelligence surveillance by the
17 executive branch paralleled the "expert administrative agency"
18 referred to with approval in Milwaukee v Illinois.

19 The present preemption analysis departs from that in
20 Milwaukee v Illinois with respect to the scope and nature of what is
21 being displaced. The court is charged with determining whether FISA
22 preempts or displaces not a common-law set of rules for conducting
23 foreign intelligence surveillance, but rather a privilege asserted
24 by the government to avoid public and judicial scrutiny of its
25 activities related to national security. In this case, those
26 activities include foreign intelligence surveillance, the subject
27 matter that Congress through FISA sought comprehensively to
28 regulate. This imperfect overlap between the preempting statute and

1 the common-law rule being preempted does not, however, create
2 serious problems with finding the state secrets privilege preempted
3 or displaced by FISA in the context of matters within FISA's
4 purview. FISA does not preempt the state secrets privilege as to
5 matters that are not within FISA's purview; for such matters, the
6 lack of comprehensive federal legislation leaves an appropriate role
7 for this judge-made federal common law privilege.

8 "The state secrets privilege is a common law evidentiary
9 privilege that protects information from discovery when disclosure
10 would be inimical to the national security. [It] has its modern
11 roots in United States v Reynolds." In re United States, 872 F2d
12 472, 474 (DC Cir 1989). "The state secrets privilege is a common
13 law evidentiary privilege that permits the government to bar the
14 disclosure of information if 'there is a reasonable danger' that
15 disclosure will 'expose military matters which, in the interest of
16 national security, should not be divulged.'" Al-Haramain Islamic
17 Foundation v Bush, 507 F3d at 1196, citing Reynolds, 345 US at 10.
18 The undersigned discussed the history and operation of the state
19 secrets privilege at some length in Hepting v AT&T Corp, 439 F Supp
20 2d 974 at 980-85 (N D Cal 2006).

21 Reynolds largely demarcated the state secrets privilege as
22 it is understood today, that is: it belongs to the government; it
23 must be properly invoked by means of a "formal claim of privilege,
24 lodged by the head of the department which has control over the
25 matter" after "actual consideration"; the court must then "determine
26 whether the circumstances are appropriate for the claim of
27 privilege, and yet do so without forcing a disclosure of the very
28 thing the privilege is designed to protect"; the precise nature,

1 extent and manner of this inquiry depends in part on the extent of a
2 party's need for the information sought tested against the strength
3 of the government's claim of privilege; and in camera review might
4 be appropriate in some cases, but not all. "When compulsion of the
5 evidence will expose military matters which, in the interest of
6 national security, should not be divulged, * * * the court should
7 not jeopardize the security which the privilege is meant to protect
8 by insisting upon an examination of the evidence, even by the judge
9 alone, in chambers." 345 US at 7-10.

10 Plaintiffs argue that the in camera procedure described in
11 FISA's section 1806(f) applies to preempt the protocol described in
12 Reynolds in this case. Doc # 435/20 at 11-14. The court agrees.
13 Section 1806(f), which is quoted in full and discussed at greater
14 length in Part III B below, provides that in cases in federal courts
15 in which "aggrieved persons" seek to discover materials relating to,
16 or information derived from, electronic surveillance, the United
17 States attorney general may file "an affidavit under oath that
18 disclosure or an adversary hearing would harm the national security
19 of the United States." In that event, the court "shall" conduct an
20 in camera, ex parte review of such materials relating to the
21 surveillance "as may be necessary to determine whether the
22 surveillance * * * was lawfully authorized and conducted." The
23 procedure described in section 1806(f), while not identical to the
24 procedure described in Reynolds, has important characteristics in
25 common with it—enough, certainly, to establish that it preempts the
26 state secrets privilege as to matters to which it relates. Section
27 1806(f) is Congress's specific and detailed prescription for how
28 courts should handle claims by the government that the disclosure of

1 material relating to or derived from electronic surveillance would
2 harm national security; it leaves no room in a case to which section
3 1806(f) applies for a Reynolds-type process. Moreover, its
4 similarities are striking enough to suggest that section 1806(f),
5 which addresses a range of circumstances in which information
6 derived from electronic surveillance might become relevant to
7 judicial proceedings, is in effect a codification of the state
8 secrets privilege for purposes of relevant cases under FISA, as
9 modified to reflect Congress's precise directive to the federal
10 courts for the handling of materials and information with purported
11 national security implications. In either event, the Reynolds
12 protocol has no role where section 1806(f) applies. For that
13 reason, the court of appeals' reliance on Reynolds in connection
14 with the Sealed Document, while perhaps instructive, would not
15 appear to govern the treatment of that document under FISA.

16 The legislative history, moreover, buttresses the court's
17 reading of the statutory text as intending that FISA replace judge-
18 made federal common law rules:

19 [T]he development of the law regulating electronic
20 surveillance for national security purposes has been
21 uneven and inconclusive. This is to be expected
22 where the development is left to the judicial branch
23 in an area where cases do not regularly come before
24 it. Moreover, the development of standards and
25 restrictions by the judiciary with respect to
26 electronic surveillance for foreign intelligence
27 purposes accomplished through case law threatens both
28 civil liberties and the national security because
that development occurs generally in ignorance of the
facts, circumstances, and techniques of foreign
intelligence electronic surveillance not present in
the particular case before the court. * * * [T]he
tiny window to this area which a particular case
affords provides inadequate light by which judges may
be relied upon to develop case law which adequately
balances the rights of privacy and national security.

1 Foreign Intelligence Surveillance Act of 1978, HR Rep No 95-1283
2 Part I at 21. This legislative history is evidence of Congressional
3 intent that FISA should displace federal common law rules such as
4 the state secrets privilege with regard to matters within FISA's
5 purview.

6 Defendants advance essentially three points in support of
7 their contention that "nothing in FISA indicates any intention by
8 Congress * * * to abrogate the state secrets privilege" in the case
9 of intelligence-driven electronic surveillance. Doc #432/17 at 13.
10 First, defendants argue that the privilege derives, not only from
11 the common law, but also from the president's Article II powers, so
12 that a "clear expression" of congressional intent is required to
13 abrogate that privilege; furthermore, abrogation would raise
14 fundamental constitutional problems which should be avoided. Doc
15 #432/17 at 13-14. Second, defendants note the common law origins of
16 the state secrets privilege and advert to the principle that
17 abrogation of common law requires a "clear and direct" legislative
18 expression of intent, which they contend is absent. Id at 14-15.
19 Finally, defendants contend that section 1806(f) serves a
20 fundamentally different purpose from the state secrets privilege and
21 that the former cannot therefore "preempt" the latter because
22 section 1806(f) governs disclosure by the government of intelligence
23 derived from electronic surveillance whereas the state secrets
24 privilege is fundamentally a rule of non-disclosure. Id at 15-22.
25 The court disagrees with all three of these contentions, the second
26 and third of which have been fully addressed in the paragraphs
27 above.

28 \\\

1 The weakness of defendants' first argument—that the
2 Constitution grants the executive branch the power to control the
3 state secrets privilege—is evident in the authorities they marshal
4 for it. Defendants rely on United States v Nixon, 418 US 683
5 (1974), in which the Supreme Court rejected President Nixon's
6 efforts to quash subpoenas under Federal Rule of Criminal Procedure
7 17(c) seeking tape recordings and documents pertaining to the
8 Watergate break-in and ensuing events. The Court rejected the
9 president's "undifferentiated claim of public interest in the
10 confidentiality of [White House] conversations" between the
11 president and his advisors, contrasting the need for confidentiality
12 of these conversations with "a claim of need to protect military,
13 diplomatic or sensitive national security secrets." *Id* at 706. In
14 the course of making this comparison, the Court observed that
15 privileges against forced disclosure find their sources in the
16 Constitution, statutes or common law. At bottom, however, Nixon
17 stands for the proposition that in the case of a common law
18 privilege such as that asserted by President Nixon, it is the
19 judiciary that defines the metes and bounds of that privilege and
20 even the confidential communications of the president must yield to
21 the needs of the criminal justice system. This hardly counts as
22 authority that the president's duties under Article II create a
23 shield against disclosure.

24 Even the Court's comparative weighing of the imperatives
25 of confidentiality for "undifferentiated" presidential discussions
26 and "military, diplomatic or sensitive national security secrets"
27 affords defendants little help in this case. Department of the Navy
28 v Egan, 484 US 518 (1988), upon which defendants rely, confirms that

1 power over national security information does not rest solely with
2 the president. Egan recognized the president's constitutional power
3 to "control access to information bearing on national security,"
4 stating that this power "falls on the President as head of the
5 Executive Branch and as Commander in Chief" and "exists quite apart
6 from any explicit congressional grant." Id at 527. But Egan also
7 discussed the other side of the coin, stating that "unless Congress
8 specifically has provided otherwise, courts traditionally have been
9 reluctant to intrude upon the authority of the Executive in military
10 and national security affairs." Id at 530 (emphasis added). Egan
11 recognizes that the authority to protect national security
12 information is neither exclusive nor absolute in the executive
13 branch. When Congress acts to contravene the president's authority,
14 federal courts must give effect to what Congress has required.
15 Egan's formulation is, therefore, a specific application of Justice
16 Jackson's more general statement in Youngstown Sheet & Tube.

17 It is not entirely clear whether defendants acknowledge
18 Congress's authority to enact FISA as the exclusive means by which
19 the executive branch may undertake foreign intelligence surveillance
20 in the domestic context. While their papers do not explicitly
21 assert otherwise, defendants' attorney in this matter stated in open
22 court during the hearing herein held on April 23, 2008 that, while
23 he conceded that "Congress sought to take over the field" of foreign
24 intelligence surveillance (Doc #452 at 29:2-3), whether the
25 president actually had constitutional authority under Article II to
26 order such surveillance in disregard of FISA remained an open
27 question: "[D]oes the president have constitutional authority under
28 Article II to authorize foreign intelligence surveillance? Several

1 courts said that he did. Congress passed the FISA, and the issue
2 has never really been resolved. That goes to the issue of the
3 authority to authorize surveillance." Id at 33:7-12. Counsel
4 repeatedly asserted that this issue was entirely separate from the
5 preemption inquiry relevant to the state secrets privilege and urged
6 the court not to "conflate" the two inquiries. E g, id at 32:8-10.

7 To the contrary, the court believes that the two areas of
8 executive branch activity pertaining to foreign intelligence
9 surveillance are not distinct for purposes of this analysis as
10 defendants' counsel asserts. Congress appears clearly to have
11 intended to—and did—establish the exclusive means for foreign
12 intelligence surveillance activities to be conducted. Whatever
13 power the executive may otherwise have had in this regard, FISA
14 limits the power of the executive branch to conduct such activities
15 and it limits the executive branch's authority to assert the state
16 secrets privilege in response to challenges to the legality of its
17 foreign intelligence surveillance activities.

18 Of note, many Congressional enactments regulate the use of
19 classified materials by the executive branch, putting FISA in good
20 company. Title 50 chapter 15 of the United States Code relates to
21 national security generally and national security information in
22 particular. Some of its provisions restrict disclosure and impose
23 minimum security requirements on the executive branch. Fifty USC
24 section 435 requires the president to "establish procedures to
25 govern access to classified information," such as background checks.
26 Others authorize disclosure. Fifty USC section 403-5d, part of the
27
28

1 USA PATRIOT Act³, permits federal law enforcement officials to share
2 foreign intelligence information obtained as part of a criminal
3 investigation. Other provisions allocate control of classified
4 material among executive branch agencies. For instance, 50
5 USC section 435a(d) gives the director of the Central Intelligence
6 Agency the power to control the State Department's use of classified
7 information. Congress elsewhere requires the executive branch to
8 disclose national security information to Congressional intelligence
9 committees. 50 USC §§ 413(a), 413b(c). Congress left the executive
10 branch no "authority to withhold information from the intelligence
11 committees on the grounds that providing the information to the
12 intelligence committees would constitute the unauthorized disclosure
13 of classified information or information relating to intelligence
14 sources and methods." 50 USC § 413(e). See also 50 USC § 425
15 ("Nothing" in subchapter IV, which pertains to "Protection of
16 Certain National Security Information," "may be construed as
17 authority to withhold information from the Congress or from a
18 committee of either House of Congress.") And 50 USC section 413(b)
19 requires that "[t]he President shall ensure that any illegal
20 intelligence activity is reported promptly to the intelligence
21 committees * * *." Congressional regulation of the use of
22 classified information by the executive branch through FISA and
23 other statutes is therefore well-established.

24 As part of their argument that the state secrets privilege
25 has a constitutional basis in Article II, defendants contend that a
26

27 ³ Uniting and Strengthening America by Providing Appropriate Tools
28 Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001,
Pub L No 107-56, § 215, 115 Stat 287, amended by USA Patriot Improvement and
Reauthorization Act of 2005, Pub L 109-178, 120 Stat 282 (2006).

1 "clear statement of congressional intent" to abrogate the privilege
2 is required, citing Franklin v Massachusetts, 505 US 788, 800-01
3 (1992). Franklin held that the office of the president was not an
4 executive "agency" whose actions were subject to judicial review
5 under the Administrative Procedures Act. The APA broadly described
6 its scope to include "each authority of the Government of the United
7 States" except Congress, the courts, the governments of United
8 States territories and the government of Washington, DC. The Court
9 nonetheless held that, when the APA did not explicitly include the
10 president and the legislative history did not suggest that Congress
11 intended for courts to review the president's actions under the APA,
12 the APA's "textual silence" was insufficient to infer that Congress
13 intended to subject the president to lawsuits under the APA: "We
14 would require an express statement by Congress before assuming it
15 intended the President's performance of his statutory duties to be
16 reviewed for abuse of discretion." See also Nixon v Fitzgerald, 457
17 US 731, 748, n27 (1982) (Court would require an explicit statement
18 by Congress before assuming Congress had created a damages action
19 against the president)." Franklin, 505 US at 800-01.

20 Franklin is readily distinguishable. The impetus for the
21 enactment of FISA was Congressional concern about warrantless
22 wiretapping of United States citizens conducted under a
23 justification of inherent presidential authority under Article II.
24 Congress squarely challenged and explicitly sought to prohibit
25 warrantless wiretapping by the executive branch by means of FISA,
26 as FISA's legislative history amply documented. This was a
27 different situation from Franklin, in which the Court required
28 certainty about Congressional intent to regulate the office of the

1 president that was absent on the record before it.

2 In the case of FISA, Congress attempted not only to put a
3 stop to warrantless wiretapping by the executive branch but also to
4 establish checks and balances involving other branches of
5 government in anticipation of efforts by future administrations to
6 undertake warrantless surveillance in some other manner:

7 In the past several years, abuses of domestic
8 national security surveillances have been
9 disclosed. This evidence alone should demonstrate
10 the inappropriateness of relying solely on
11 executive branch discretion to safeguard civil
12 liberties. This committee is well aware of the
13 substantial safeguards respecting foreign
14 intelligence electronic surveillance currently
embodied in classified Attorney General procedures,
but this committee is also aware that over the past
thirty years there have been significant changes in
internal executive branch procedures, and there is
ample precedent for later administrations or even
the same administration loosening previous
standards.

15 H R Rep No 95-1283(I) at 21. Given the possibility that the
16 executive branch might again engage in warrantless surveillance and
17 then assert national security secrecy in order to mask its conduct,
18 Congress intended for the executive branch to relinquish its near-
19 total control over whether the fact of unlawful surveillance could
20 be protected as a secret.

21 Reynolds itself, holding that the state secrets privilege
22 is part of the federal common law, leaves little room for
23 defendants' argument that the state secrets privilege is actually
24 rooted in the constitution. Reynolds stated that the state secrets
25 privilege was "well-established in the law of evidence." 345 US at
26 6-7. At the time, Congress had not yet approved the Federal Rules
27 of Evidence, and therefore the only "law of evidence" to apply in
28 federal court was an amalgam of common law, local practice and

1 statutory provisions with indefinite contours. John Henry Wigmore
2 (revised by Peter Tillers), I Evidence §6.1 at 384-85 (Little,
3 Brown & Co 1983). The Court declined to address the constitutional
4 question whether Congress could limit executive branch authority to
5 withhold sensitive documents, but merely interpreted and applied
6 federal common law. See Reynolds, 345 US at 6 & n9.

7 Defendants' attempt to establish a strict dichotomy
8 between federal common law and constitutional interpretation is,
9 moreover, misconceived because all rules of federal common law have
10 some grounding in the Constitution. "Federal common law implements
11 the federal Constitution and statutes, and is conditioned by them.
12 Within these limits, federal courts are free to apply the
13 traditional common-law technique of decision and to draw upon all
14 the sources of the common law in cases such as the present."
15 D'Oench, Duhme & Co v FDIC, 315 US 447, 472 (1942) (Jackson
16 concurring). The rules of federal common law on money and banking,
17 for instance, all derive from the Constitution. See Clearfield
18 Trust Co v United States, 318 US 363, 366 (1943) (in disbursements
19 of funds and payment of debts, United States exercises a
20 constitutional function or power). The federal common law
21 pertaining to tort suits brought by United States soldiers against
22 private tortfeasors flows from Congress's powers under Article I
23 section 8. United States v Standard Oil Co, 332 US 301, 306 n7
24 (1947). Accordingly, all rules of federal common law perform a
25 function of constitutional significance.

26 In the specific context of the state secrets privilege,
27 it would be unremarkable for the privilege to have a constitutional
28 "core" or constitutional "overtones." See Robert M Chesney, State

1 Secrets and the Limits of National Security Litigation, 75 George
2 Wash L Rev 1249, 1309-10 (2007). Article II might be nothing more
3 than the source of federal policy that courts look to when applying
4 the common law state secrets privilege. But constitutionally-
5 inspired deference to the executive branch is not the same as
6 constitutional law.

7 In any event, the parties' disagreement over the origins
8 of the state secrets privilege is of little practical significance.
9 Whether a "clear statement," a comprehensive legislative scheme or
10 something less embracing is required, Congress has provided what is
11 necessary for this court to determine that FISA preempts or
12 displaces the state secrets privilege, but only in cases within the
13 reach of its provisions. This is such a case.

14
15 C

16 In addition to their more substantial arguments,
17 defendants advance two arguments why the court should not even take
18 up the issue remanded by the court of appeals. Defendants' first
19 such argument in this regard may be easily dispatched. Defendants
20 argue that the court may not reach the question remanded for
21 consideration by the court of appeals because the court lacks
22 jurisdiction over plaintiffs' claims. Wholly apart from the
23 disregard for the court of appeals—whose decisions bind this
24 court, after all—that acceptance of defendants' argument would
25 entail, defendants' argument lacks merit.

26 Defendants premise their argument on plaintiffs' lack of
27 standing to obtain prospective relief; that is, because plaintiffs
28 cannot show that they have been injured or face a "real and

1 immediate threat" of harm in the future, defendants conclude that
2 Article III standing is absent. Doc # 432/17 at 7-8. Plaintiff
3 cannot show injury, contend defendants, because the state secrets
4 privilege prevents the government from confirming or denying that
5 plaintiffs have been subjected to unlawful surveillance.

6 The circularity of defendants' argument to one side,
7 defendants conflate the state secrets privilege with the "aggrieved
8 person" requirement of section 1810, discussed in Part III infra.
9 If plaintiffs can show that they are "aggrieved" as section 1810
10 contemplates, then plaintiffs have adequately demonstrated injury
11 for purposes of establishing Article III standing.

12 Somewhat more substantially, defendants argue that
13 plaintiffs cannot pursue their claims because section 1810 does not
14 waive the United States' sovereign immunity against suits naming
15 the government or individuals acting in their official capacity.
16 Employing a variety of arguments, defendants assert that civil
17 liability under section 1810 is "linked to intentional misconduct
18 by individual federal employees and officials." Doc # 446/29 at 7.
19 They also assert that "[t]he Complaint does not name any of the
20 individual defendants in their individual capacity." Doc # 432 at
21 9. And they point out that plaintiffs have not served defendants
22 in their individual capacities, an assertion that plaintiffs do not
23 dispute. Doc # 450/31 at 2.

24 Plaintiffs counter that defendants made similar arguments
25 before the court of appeals but that the court of appeals did not
26 address those points in its disposition of defendants' appeal. Doc
27 # 435/20 at 24. Plaintiffs also contend that for the court to take
28 up this issue and, especially, to entertain defendants' assertion

1 that governmental immunity bars adjudication of the other issues
2 before the court, would violate the court of appeals' instructions
3 to this court in its order remanding the case. Id.

4 It is, of course, true that section 1810 does not contain
5 a waiver of sovereign immunity analogous to that in 18 USC section
6 2712(a) which expressly provides that aggrieved persons may sue the
7 United States for unlawful surveillance in violation of Title III.
8 But FISA directs its prohibitions to "Federal officers and
9 employees" (see, e g, 50 USC §§ 1806, 1825, 1845) and it is only
10 such officers and employees acting in their official capacities
11 that would engage in surveillance of the type contemplated by FISA.
12 The remedial provision of FISA in section 1810 would afford scant,
13 if any, relief if it did not lie against such "Federal officers and
14 employees" carrying out their official functions. Implicit in the
15 remedy that section 1810 provides is a waiver of sovereign
16 immunity.

17 Of no small moment to this court's consideration of
18 defendants' sovereign immunity contention, it appears that
19 defendants asserted the same argument in the court of appeals which
20 seems simply to have ignored it, presumably as insubstantial or
21 premature given the present state of the record.

22 In Part IV of this order, the court discusses whether
23 plaintiffs should be granted leave to serve defendants in their
24 individual capacities.

25 26 III

27 The determination that FISA preempts the state secrets
28 privilege does not necessarily clear the way for plaintiffs to

1 pursue their claim for relief against these defendants under FISA's
2 section 1810. That section provides:

3 An aggrieved person, other than a foreign power or an
4 agent of the foreign power * * * who has been
5 subjected to an electronic surveillance or about whom
6 information obtained by electronic surveillance of
7 such person has been disclosed or used in violation
8 of section 1809 of this title shall be entitled to
9 recover—

10 (a) actual damages * * *

11 (b) punitive damages; and

12 (c) reasonable attorney's fees and other
13 investigation and litigation costs reasonably
14 incurred.

15 50 USC § 1810. An "aggrieved person" is "a person who is the
16 target of an electronic surveillance or any other person whose
17 communications or activities were subject to electronic
18 surveillance." 50 USC § 1801(i). Section 1809, violation of which
19 forms the basis for liability under section 1810, criminalizes two
20 types of conduct: (1) intentionally "engag[ing] in electronic
21 surveillance under color of law except as authorized by statute"
22 and (2)

23 disclos[ing] or us[ing] information obtained under
24 color of law by electronic surveillance, knowing or
25 having reason to know that the information was
26 obtained through electronic surveillance not
27 authorized by statute.

28 A host of obstacles, however, make section 1810 a mostly
theoretical, but rarely, if ever, a practical vehicle for seeking a
civil remedy for unlawful surveillance.

A

Before an aggrieved person can bring an action for
damages under section 1810, the person must learn somehow of the

1 electronic surveillance and thus the cause to be "aggrieved." The
2 primary circumstance FISA describes in which a person learns of
3 this surveillance arises from a criminal proceeding—i e, if and
4 when the individual is arrested and charged with a crime. For
5 example, section 1806(c) provides:

6 Whenever the Government intends to enter into evidence
7 or otherwise use or disclose in any trial, hearing, or
8 other proceeding in or before any court, department,
9 officer, agency, regulatory body, or other authority of
10 the United States, against an aggrieved person, any
11 information obtained or derived from an electronic
12 surveillance of that aggrieved person pursuant to the
13 authority of this subchapter, the Government shall,
prior to the trial, hearing, or other proceeding or at
a reasonable time prior to an effort to so disclose or
so use that information or submit it in evidence,
notify the aggrieved person and the court or other
authority in which the information is to be disclosed
or used that the Government intends to so disclose or
so use such information.

14 Nearly identical requirements applicable to state governments
15 require notification to the attorney general of the United States
16 as well as to the aggrieved party and the court. § 1806(d). An
17 analogous pair of notification provisions pertaining to evidence
18 obtained pursuant to physical searches applies to the United States
19 and to state governments, respectively. § 1825(d) and (e). See
20 also § 1845(c) and (d)(pertaining to pen registers and trap and
21 trace devices) and 50 USC § 1861(h)(part of the USA PATRIOT Act
22 enacted in 2001 and amended in 2006, pertaining to "information
23 acquired from tangible things").

24 FISA's section 1806(j) provides for notice to be given to
25 the United States person targeted for surveillance when "an
26 emergency employment of electronic surveillance is authorized under
27 section 1805(e) * * * and a subsequent order approving the
28 surveillance is not obtained." In that circumstance, the judge

1 "shall cause to be served" on the affected United States persons
2 notice of the fact of the application, the period of the
3 surveillance and "the fact that during the period information was
4 or was not obtained." The notice provided for under section
5 1806(j) may be postponed or suspended once for up to ninety days
6 upon an ex parte showing of good cause by the government. Upon a
7 further ex parte showing of good cause, the notice requirement
8 under section 1806(j) may be forever waived.

9 FISA contains a provision requiring direct notification
10 to a "United States person" whose residence has been searched under
11 FISA's section 1824 if "at any time after the search the Attorney
12 General determines there is no national security interest in
13 continuing to maintain the secrecy of the search." 50 USC §
14 1825(b). In that event, the attorney general "shall provide notice
15 to the United States person * * * of the fact of the search
16 conducted * * * and shall identify any property of such person
17 seized, altered, or reproduced during such search." Id.

18 Intelligence-gathering related to national security is
19 generally not for law enforcement; in fact, the initiation of law
20 enforcement actions may work at cross-purposes to the goals of the
21 intelligence-gathering by disrupting surveillance that is more
22 valuable to national security goals if left intact. The sense that
23 intelligence-gathering under FISA was rarely for the purpose of
24 criminal prosecution emerges from the text of FISA as crafted in
25 Congress and from its legislative history. In the context of
26 allowing the destruction of surveillance records acquired under
27 FISA, the Senate Report distinguished FISA from Title III, noting:

28 \\\

1 Although there may be cases in which information
2 acquired from a foreign intelligence surveillance
3 will be used as evidence of a crime, these cases
4 are expected to be relatively few in number,
5 unlike Title III interceptions the very purpose of
6 which is to obtain evidence of criminal activity.
7 The Committee believes that in light of the
8 relatively few cases in which information acquired
9 under this chapter may be used as evidence, the
10 better practice is to allow the destruction of
11 information that is not foreign intelligence
12 information or evidence of criminal activity.
13 This course will more effectively safeguard the
14 privacy of individuals * * *.

9 Foreign Intelligence Surveillance Act of 1978, S Rep No 95-604 Part
10 I, 95th Cong 2d Sess 39 (1978), reprinted in 1978 USCCAN 3940-41.
11 Situations in which individuals subject to FISA warrants would be
12 notified of such warrants are therefore narrowly circumscribed
13 under FISA and this appears to be by design.

14 FISA also contains reporting requirements to facilitate
15 Congressional oversight of FISA, but these are of little help to an
16 individual seeking to learn of having been the subject of a FISA
17 warrant: sections 1808 (electronic surveillance), 1826 (physical
18 searches), 1846 (pen registers and trap and trace devices) and 1862
19 (requests for production of tangible things). Each of these
20 provisions, under the heading "Congressional oversight," requires
21 semiannual reporting by the United States attorney general to
22 Congress.

23 As relevant to the subject matter of the instant action,
24 section 1808(a)(1) requires that the attorney general on a
25 semiannual basis "fully inform" certain Congressional committees
26 "concerning all electronic surveillance under this subchapter."
27 Section 1801(a)(2) requires that each report under section
28 1808(a)(1) include a description of:

1 (A) the total number of applications made for orders
2 and extensions of orders approving electronic
3 surveillance under this subchapter where the nature
and location of each facility or place at which the
electronic surveillance will be directed is unknown;

4 (B) each criminal case in which information acquired
5 under this chapter has been authorized for use at
trial during the period covered by such report; and

6 (C) the total number of emergency employments of
7 electronic surveillance under section 1805(f) of this
title and the total number of subsequent orders
8 approving or denying such electronic surveillance.

9 Of note, these provisions only require itemized information about
10 surveillances to be reported to Congress if the information
11 pertains to criminal cases in which the information is intended to
12 be used at trial. All other surveillances and/or uses need be
13 reported in the form of aggregate numbers only.

14 A further reporting requirement newly adopted in 2004 as
15 part of the Intelligence Reform and Terrorism Prevention Act of
16 2004, PL 108-458, requires the attorney general to report
17 semiannually to the Congressional intelligence committees:

18 (1) the aggregate number of persons targeted for
19 orders issued under this chapter [broken down by
type of warrant or search];

20 (2) the number of individuals covered by an order
21 issued pursuant to [§ 1801(b)(1)(C) (i e non-
22 United States persons who are "agent[s] of a
foreign power" engaged in "international terrorism
or activities in preparation therefor")];

23 (3) the number of times that the Attorney General
24 has authorized that information obtained under
this chapter may be used in a criminal proceeding
* * *;

25 (4) a summary of significant legal interpretations
26 of this chapter involving matters before the FISC
or the FISCR * * *; and

27 (5) copies of all decisions (not including orders)
28 or opinions of the FISC or FISCR that include

1 significant construction or interpretation of the
2 provisions of this chapter.

3 50 USC § 1871(a). These reports are presumably not available to
4 the press or the public; in any event, they do not provide any
5 means for an individual to learn of having been subject to
6 surveillance or search under a FISA warrant.

7 A provision requiring periodic reporting to Congress by
8 the Department of Justice of the number of pen register orders and
9 orders for trap and trace devices applied for under 18 USC § 3123
10 and under FISA by law enforcement agencies of the Department of
11 Justice was enacted in 1986 as part of the Electronic
12 Communications Privacy Act of 1986, Pub L 99-508, 100 Stat 1871.
13 18 USC §§ 3121(a), 3126. The report to Congress must include
14 certain specifics as to each order: the period of interceptions,
15 including extensions, the offense, the number of investigations,
16 the number and nature of facilities affected and the identity of
17 the applying agency and the person authorizing the order. Id §
18 3126. There are, however, no specific notification requirements in
19 that chapter (Chapter 206).

20 By contrast, Title III, 18 USC §§ 2510-22, the federal
21 wiretapping statute used by law enforcement to conduct electronic
22 surveillance domestically, provides not only for reporting to
23 Congress to facilitate oversight of the executive branch's
24 surveillance activities, but also for notice as a matter of course
25 to individuals surveilled and for civil liability to such
26 individuals in the event of unlawful surveillance.

27 Reporting to Congress on electronic surveillance under
28 Title III is the responsibility of the judiciary, the Department of

1 Justice and the individual states' attorneys general. All three
2 are separately and independently obligated to provide data about
3 applications for electronic surveillance to the Administrative
4 Office of the United States Courts, which in turn must transmit
5 annually to Congress "a full and complete report concerning the
6 number of applications for orders and extensions granted or denied
7 pursuant to this chapter during the preceding calendar year." 18
8 USC § 2519. "The reports are not intended to include confidential
9 material [but] should be statistical in character * * * It will
10 assure the community that the system of court-order electronic
11 surveillance envisioned by the proposed chapter is properly
12 administered * * *." Omnibus Crime Control and Safe Streets Act of
13 1968, S Rep No 1097, 90th Cong 2d Sess (1968), reprinted in 1968
14 USCCAN at 2196.

15 Regarding notice to surveilled individuals, 18 USC
16 section 2518(d) provides that, "within a reasonable time but not
17 later than ninety days after the filing of an application [for
18 interception of electronic communications]," whether successful or
19 unsuccessful, the judge in the matter "shall cause to be served" on
20 the individuals affected "an inventory" notifying them of the fact,
21 date and disposition of the order or application and whether or not
22 wire, oral or electronic communications were intercepted. The
23 statute further authorizes the judge, upon motion by an individual
24 so notified, to allow inspection of "such portions of the
25 intercepted communications, applications and orders as the judge
26 determines to be in the interest of justice." Id. The serving of
27 the inventory may be postponed "on an ex parte showing of good
28 cause * * *." Id.

1 The legislative history of this provision both
2 acknowledges and addresses the potential implications for national
3 security of section 2518(d)'s notice requirement and expressly
4 contemplates civil actions based on the inventories:

5 [W]here the interception relates, for example, to a
6 matter involving or touching on the national security
7 interest, it might be expected that the period of
8 postponement could be extended almost indefinitely.
9 Yet the intent of the provision is that the principle
10 of postuse notice will be retained. This provision
11 alone should insure the community that the techniques
are reasonably employed. Through its operation all
authorized interceptions must eventually become known
at least to the subject. He can then seek
appropriate civil redress for example, under section
2520 * * * if he feels that his privacy has been
unlawfully invaded.

12 1968 USCCAN at 2194. In describing the civil damages available
13 under section 2520, the Senate report stated that Congress
14 expressly contemplated the provisions requiring notice to affected
15 individuals to form the basis for civil suits: "It is expected
16 that civil suits, if any, will instead grow out of the filing of
17 * * * inventories under section 2518(8)(d)." Id at 2196.

18 Eighteen USC section 2520, in turn, provides for civil
19 remedies in the form of injunctive relief, declaratory relief and
20 damages and sets out specific measures of damages based on the
21 number of violations (\$50-500 for the first finding of liability,
22 \$100-1000 for the second and, for the third or other subsequent
23 finding of liability, actual damages and profits reaped or \$100 per
24 day or \$10,000). 18 USC § 2520(c). Defenses include, inter alia,
25 good faith reliance on a court warrant or order, grand jury
26 subpoena or legislative or statutory authorization. Id.

27 In summary, FISA makes little provision for notice to
28 surveilled individuals except when the government chooses to

1 disclose surveillance materials and the provisions that exist are
2 easy for the government to avoid. This must be presumed to be part
3 of Congress's design for FISA because the notification procedure in
4 Title III—which, moreover, contemplated special handling of cases
5 involving national security concerns—predated FISA by a decade.
6 Congress could have modeled FISA on Title III in this regard, but
7 did not do so. In consequence, the cases are few and far between
8 in which an individual ever learns of having been subject to
9 electronic surveillance within FISA's purview and therefore
10 possibly having standing as an aggrieved party for FISA section
11 1810 purposes.

12 One of the few cases in which an individual surveilled
13 under a FISA warrant became aware of his status as an "aggrieved
14 party" is that of Brendan Mayfield, an American-born United States
15 citizen, attorney and former United States Army officer who brought
16 suit against the United States after being arrested and imprisoned
17 in 2004 upon suspicion of involvement in the conspiracy to detonate
18 bombs on commuter trains in Madrid, Spain. Mayfield v United
19 States, 504 F Supp 2d 1023 (D Or 2007). The Mayfield case is
20 instructive. The investigation leading to the arrest and the
21 arrest itself were apparently the result of a false fingerprint
22 match which led the FBI, among other things, to seek and obtain
23 from the FISC an order authorizing electronic surveillance of
24 Mayfield's home and his law office. Id at 1028. The published
25 opinion in Mayfield noted, without providing specifics, that
26 Mayfield had settled claims for "past injuries," id at 1033;
27 Mayfield, however, continued to press his claims for a declaration
28 that FISA, as amended by the USA PATRIOT Act, violated the Fourth

1 Amendment by undermining the requirement of probable cause as a
2 pre-condition for obtaining a search warrant and for collecting,
3 disseminating and retaining information thus obtained. Mayfield
4 also claimed that FISA violated the Fourth Amendment by permitting
5 warrants to be issued under FISA without a showing that the
6 "primary purpose" of the search is to obtain foreign intelligence
7 information. Id at 1032.

8 The district court agreed with Mayfield and granted, on
9 summary judgment, a declaration finding FISA unconstitutional. The
10 United States appealed this order and the appeal is now pending
11 before the court of appeals.

12 The district court drew particular attention to the
13 "notice problem" under FISA:

14 Nor does FISA require notice. The Fourth Amendment
15 ordinarily requires that the subject of a search be
16 notified that the search has occurred. Although in
17 some circumstances the government is permitted to
18 delay the provision of notice, the Supreme Court has
19 never upheld a statute that, like FISA, authorizes
20 the government to search a person's home or intercept
21 his communications without ever informing the person
22 that his or her privacy has been violated. Except
23 for the investigations that result in criminal
24 prosecutions, FISA targets never learn that their
25 homes or offices have been searched or that their
26 communications have been intercepted. Therefore,
27 most FISA targets have no way of challenging the
28 legality of the surveillance or obtaining any remedy
for violations of their constitutional rights.

Id at 1039.

Ironically, the Mayfield case seems an ideal one for the
government to provide notification under section 1825(b), discussed
above, which directs the attorney general to notify United States
persons whose residences have been subjected to physical search
after the attorney general "determines there is no national

1 security interest in continuing to maintain the secrecy of the
2 search." Yet the government leaned toward secrecy rather than
3 candor. Only after Mayfield had filed litigation and moved to
4 compel notification did the government notify him of the physical
5 search and, in doing so, contended that both the fact and the
6 extent of notification were entirely within the attorney general's
7 discretion. Agency Defendants' Reply In Support Of Motion to
8 Dismiss Counts Twelve and Thirteen and Opposition to Motion to
9 Compel, Mayfield v Gonzales, CV 04-1427-AA Doc # 72 at 6-10, United
10 States District Court for the District of Oregon, filed April 15,
11 2005. Mayfield later challenged the sufficiency of the
12 government's disclosure. Mayfield v Gonzales, 2005 WL 1801679, *17
13 (D Or 2005). The Mayfield case illustrates the limited
14 effectiveness of FISA's narrowly-defined notice provision relating
15 to physical searches. Limited and imperfect as FISA's notification
16 provision for physical searches may be, FISA contains no comparable
17 provision for United States persons who have been subjected to
18 electronic surveillance as opposed to physical search.

19 In the Al-Haramain case, notification to plaintiffs of
20 their potential status as "aggrieved parties" came in the form of
21 an accident: the inadvertent disclosure of the Sealed Document
22 during discovery proceedings, a disclosure that the various United
23 States entities involved took immediate and largely successful
24 steps to undo. To speak metaphorically, the inadvertent disclosure
25 by OFAC of the Sealed Document amounted to a small tear in the
26 thick veil of secrecy behind which the government had been
27 conducting its electronic surveillance activities. The Oregon
28 district court refused to allow plaintiffs to learn more by

1 conducting discovery, but held that no further harm could result
2 from working with the salient information divulged thus far. By
3 refusing to allow the use of the Sealed Document in any form for
4 the adjudication of plaintiffs' claims in this matter, the court of
5 appeals required that the small tear be stitched closed, leaving
6 plaintiffs with actual but not useful notice and without the sole
7 item of evidence they had offered in support of their claims.

8
9 B

10 Difficult as it is to learn of one's status as an
11 aggrieved party for section 1810 purposes, an aggrieved party needs
12 more than mere knowledge of the surveillance to be able to proceed
13 with a lawsuit under section 1810. The next major obstacle to
14 seeking civil remedies under FISA is the lack of a practical
15 vehicle for obtaining and/or using admissible evidence in support
16 of such claims. An aggrieved party must be able to produce
17 evidence sufficient to establish standing to proceed as an
18 "aggrieved party" and, later, to withstand motions for dismissal
19 and/or summary judgment. This effort is encumbered with legal and
20 practical obstacles.

21 As noted above in Part III A, FISA does not provide for
22 the preservation of recordings and other information obtained
23 pursuant to a FISA warrant. Rather, Congress intended to allow
24 such material to be destroyed, the idea being that to allow
25 destruction would better protect the privacy of individuals
26 surveilled than to require preservation. S Rep No 95-604 Part I at
27 39. By contrast, Title III expressly requires intercepted
28 communications to be recorded and expressly prohibits destruction

1 of the recordings except upon an order of the issuing or denying
2 judge. Also, "in any event [they] shall be kept for ten years."
3 18 USC § 2518(8)(a). It provides, moreover, that "custody of the
4 recordings shall be wherever the judge orders." Id. These
5 provisions ensure that a body of evidence establishing the fact of
6 the surveillance is brought into existence and safeguarded under a
7 a judge's control. By failing to impose parallel obligations on
8 the government agencies and officials who are the putative
9 defendants in an action alleging FISA violations, FISA provides
10 little help to "aggrieved persons" who might seek to become civil
11 plaintiffs.

12 Plaintiffs and plaintiff amici contend that FISA's
13 section 1806(f) provides the means for them to overcome this
14 evidentiary hurdle. The court has carefully studied section
15 1806(f) and does not agree.

16 As relevant here, section 1806(f) provides:

17 whenever any motion or request is made by an aggrieved
18 person pursuant to any other statute or rule of the
19 United States * * * before any court * * * of the
20 United States * * * to discover or obtain applications
21 or orders or other materials relating to electronic
22 surveillance or to discover, obtain, or suppress
23 evidence or information obtained or derived from
24 electronic surveillance under this chapter, the United
25 States district court * * * shall, notwithstanding any
26 other law, if the Attorney General files an affidavit
27 under oath that disclosure or an adversary hearing
28 would harm the national security of the United States,
review in camera and ex parte the application, order,
and such other materials relating to the surveillance
as may be necessary to determine whether the
surveillance of the aggrieved person was lawfully
authorized and conducted. In making this
determination, the court may disclose to the aggrieved
person, under appropriate security procedures and
protective orders, portions of the application, order,
or other materials relating to the surveillance only
where such disclosure is necessary to make an accurate
determination of the legality of the surveillance.

1 The parties have argued at length in their papers and in court
2 about the meaning and application of this convoluted pair of
3 sentences. Both plaintiff amici and telecommunications carrier
4 defendant amici ("defendant amici") have devoted their entire
5 amicus briefs to this subject. Doc # 440/23, 442/25.

6 Defendants contend that section 1806(f) does not come
7 into play unless and until the government has acknowledged that it
8 surveilled the "aggrieved person" in question (by, for example,
9 initiating criminal proceedings), but that it is not available as a
10 means for an individual to discover having been surveilled absent
11 such governmental acknowledgment. See, e g, Doc #432/17 at 16-20.
12 Defendants further assert that, assuming arguendo that FISA
13 "preempts" the state secrets privilege, as this court holds it does
14 for purposes of electronic surveillance, plaintiffs would still be
15 unable to establish their standing as "aggrieved persons" for
16 section 1810 purposes without "inherently risk[ing] or requir[ing]
17 the disclosure of state secrets to the plaintiffs and the public at
18 large." Id at 22-23.

19 The defendant amici present more detailed arguments about
20 section 1806(f) that are in accord with defendants' position. They
21 assert that the "motion * * * to discover" provision at issue in
22 this case "creates no rights for aggrieved persons; it provides
23 procedures to implement their existing right to seek discovery in
24 support of efforts to suppress evidence obtained or derived from
25 electronic surveillance." Doc #442/25 at 5. Defendant amici
26 further assert that section 1806(f)'s purpose was to preserve for
27 the prosecution a "dismiss option" when the legality of
28 surveillance evidence is challenged, so that the prosecution could

1 choose not to proceed rather than risk the disclosure of classified
2 information. Id at 10-11. In support of this contention, they
3 point to section 1806(f)'s language providing for the United States
4 attorney general to invoke its procedures and argue that the
5 section does not provide for courts to compel the disclosure of
6 information absent the attorney general's involvement. Id at 11.

7 Defendant amici also contrast FISA's section 1806(f) with
8 18 USC section 3504(a)(1), enacted in 1970 as part of the Organized
9 Crime Control Act. The latter establishes a procedure by which "a
10 party aggrieved" seeking to exclude evidence based on a claim that
11 it was obtained illegally may obligate "the opponent of the claim"
12 (i e, the government) "to affirm or deny the occurrence of the
13 alleged unlawful act." Defendant amici argue that "[t]he existence
14 of the carefully circumscribed discovery right in § 3504 negates any
15 suggestion that § 1806(f) implicitly covers the same ground" and
16 cite United States v Hamide, 914 F2d 1147 (9th Cir 1990) for the
17 proposition that section 3504(a) and section 1806(f) can be used
18 together but that they accomplish different objectives and cannot be
19 construed as serving similar purposes. Doc # 442/25 at 15-16.

20 In Hamide, an immigration judge had entertained a motion
21 under section 3504(a)(1) by an individual in deportation proceedings
22 requesting that the government affirm or deny the existence of
23 electronic surveillance. After the government disclosed that it had
24 conducted electronic surveillance of the individual, it filed in the
25 district court a "Petition of the United States for Judicial
26 Determination of Legality of Certain Electronic Surveillance" under
27 FISA's section 1806(f), together with the FISA materials relevant to
28 the authorization of the surveillance filed under seal and a request

1 that the matter be handled ex parte for national security reasons.
2 914 F2d at 1149. The district court then ruled ex parte in the
3 government's favor. Id at 1149-50.

4 Defendant amici argue that Congress could have
5 incorporated into FISA a procedure like that provided for in
6 section 3504(a)(1) by which an individual could require the
7 executive branch to confirm or deny the existence of electronic
8 surveillance and, since Congress did not do so, it must be presumed
9 not to have intended such a procedure to be available under FISA.
10 Doc #442/25 at 16.

11 Plaintiff amici counter defendants' arguments against
12 plaintiffs' proposed use of section 1806(f) with several major
13 contentions. First, they argue that section 1806(f)'s scope is
14 expansive enough to provide for in camera review in any civil or
15 criminal case—not merely cases arising under FISA—in which a
16 claim of unlawful surveillance is raised. Doc #440/23 at 11-13,
17 17. They point out that the text of section 1806(f) referring to
18 "any motion or request * * * pursuant to any other statute or rule
19 of the United States" does not suggest a limitation to criminal
20 statutes. Id at 11. They also point to language in the conference
21 report on the final version of FISA stating "[t]he conferees agree
22 that an in camera and ex parte proceeding is appropriate for
23 determining the lawfulness of electronic surveillance in both
24 criminal and civil cases." Id at 13, citing H Conf Rep 95-1720 at
25 32. And plaintiff amici find support in the District of Columbia
26 Circuit's opinion in ACLU Foundation of Southern California v Barr,
27 952 F2d 457, 465 n 7 (D C Cir 1991), which cited FISA's legislative
28 history for the proposition that Congress had intended a court's in

1 camera, ex parte review under section 1806(f) to "determine whether
2 the surveillance was authorized and conducted in a manner that did
3 not violate any constitutional or statutory right." Thus,
4 plaintiff amici contend, section 1810 is one such "other statute"
5 referred to in section 1806(f) under which in camera review is
6 available.

7 Next, plaintiff amici characterize defendants' contention
8 that section 1806(f) is only available in cases in which the
9 government has acknowledged having surveilled a party as "look[ing]
10 at section 1806(f) through the wrong end of the telescope." Doc
11 #440/23 at 14. Plaintiff amici correctly observe that section
12 1806(f) only comes into play when the attorney general notifies the
13 court that "disclosure or an adversary hearing would harm the
14 national security"—for example, in opposing a discovery request.
15 A "motion or request * * * by an aggrieved person" alone is not
16 sufficient to trigger in camera review. Therefore, they argue,
17 defendants' position that the government must have acknowledged
18 surveillance sets the bar higher than FISA prescribes.

19 Third, plaintiff amici address what they believe the bar
20 should be—that is, what an individual must show to establish being
21 "aggrieved" for section 1806(f) purposes. They assert that a
22 person need only have a "colorable basis for believing he or she
23 had been surveilled." Doc #440/23 at 11-16. Lacking examples
24 arising directly under section 1806(f), plaintiff amici look to
25 cases decided under 18 USC section 3504(a)(1) (discussed above),
26 including United States v Vielguth, 502 F2d 1257, 1258 (9th Cir
27 1974). In Vielguth, the Ninth Circuit held that the government's
28 obligation to affirm or deny the occurrence of electronic

1 surveillance under section 3504(a)(1) "is triggered by the mere
2 assertion that unlawful wiretapping has been used against a party."
3 Plaintiff amici argue that the standard articulated in Vielguth is
4 the applicable standard for an "aggrieved person" for purposes of
5 FISA's section 1806(f). Doc #440/23 at 16.

6 The court agrees with plaintiffs that section 1806(f) is
7 not limited to criminal proceedings, but may also be invoked in
8 civil actions, including actions brought under section 1810. The
9 court disagrees with defendants' proposed limitation of section
10 1806(f) to cases in which the government has acknowledged the
11 surveillance at issue. The plain language of the statute, which
12 the court must use as its primary compass, United States v Ron Pair
13 Enterprises, Inc, 489 US 235, 242 (1988), does not support
14 defendants' purported limitations.

15 The court parts company with plaintiffs, however, with
16 regard to what an individual must show to establish being
17 "aggrieved" for section 1806(f) purposes and, consequently, the
18 availability of section 1806(f) to plaintiffs in this case in its
19 current posture. As the court reads section 1806(f), a litigant
20 must first establish himself as an "aggrieved person" before
21 seeking to make a "motion or request * * * to discover or obtain
22 applications or orders or other materials relating to electronic
23 surveillance [etc]." If reports are to be believed, plaintiffs
24 herein would have had little difficulty establishing their
25 "aggrieved person" status if they were able to support their
26 request with the Sealed Document. But the court of appeals,
27 applying the state secrets privilege, has unequivocally ruled that
28 plaintiffs in the current posture of the case may not use "the

1 Sealed Document, its contents, and any individuals' memories of its
2 contents, even well-reasoned speculation as to its contents." 507
3 F3d at 1204. Plaintiffs must first establish "aggrieved person"
4 status without the use of the Sealed Document and may then bring a
5 "motion or request" under § 1806(f) in response to which the
6 attorney general may file an affidavit opposing disclosure. At
7 that point, in camera review of materials responsive to the motion
8 or request, including the Sealed Document, might well be
9 appropriate.

10 The court disagrees with plaintiff amici's suggestion
11 that Vielguth, an opinion that established a claimant's burden to
12 invoke 18 USC section 3504(a)(1), should also be relied on to
13 define the burden for an individual to establish standing as an
14 "aggrieved person" for purposes of FISA section 1806(f). The bar
15 set by Vielguth is too low given the text and structure of FISA.
16 Moreover, a review of other Ninth Circuit cases reveals that
17 Vielguth did not define the standard for all purposes under section
18 3504(a)(1). The court in Vielguth was at pains to distinguish its
19 earlier decision in United States v Alter, 482 F2d 1016 (9th Cir
20 1973), which, while stating that a witness "does not have to plead
21 and prove his entire case to establish standing and to trigger the
22 Government's responsibility to affirm or deny," nonetheless
23 established a stringent test for making out a prima facie issue of
24 electronic surveillance of counsel for a grand jury witness. The
25 court held required affidavits that established:

26 (1) the specific facts which reasonably lead the
27 affiant to believe that named counsel for the named
28 witness has been subjected to electronic
surveillance;

(2) the dates of such suspected surveillance;

1 (3) the outside dates of representation of the
2 witness by the lawyer during the period of
surveillance;

3 (4) the identity of the person(s), by name or
4 description, together with their respective telephone
5 numbers, with whom the lawyer (or his agents or
employees) was communicating at the time the claimed
surveillance took place; and

6 (5) facts showing some connection between possible
7 electronic surveillance and the grand jury witness
8 who asserts the claim or the grand jury proceeding in
which the witness is involved.

9 Id at 1026. Vielguth distinguished Alter by limiting the latter to
10 "a claim by the person under interrogation that questions put to
11 him are tainted by unlawful surveillance of conversations in which
12 he did not participate" and did so only over the dissent of one of
13 the three panel members. 502 F2d at 1259-61.

14 Not long after Vielguth, the Ninth Circuit clarified the
15 standard, but only slightly. In United States v See, 505 F2d 845,
16 855-56 (9th Cir 1974), the court rejected a claim under section
17 3504 as "vague to the point of being a fishing expedition" and held
18 that correspondingly little was required of the government. The
19 court noted that "a general claim requires only a response
20 appropriate to such a claim" and that "varying degrees of
21 specificity in a claim will require varying degrees of specificity
22 in a response." Id at 856 & n 18.

23 The flexible or case-specific standards articulated by
24 the Ninth Circuit for establishing aggrieved status under section
25 3504(a)(1), while certainly relevant, do not appear directly
26 transferrable to the standing inquiry for an "aggrieved person"
27 under FISA. While attempting a precise definition of such a
28 standard is beyond the scope of this order, it is certain that

1 plaintiffs' showing thus far with the Sealed Document excluded
2 falls short of the mark. Plaintiff amici hint at the proper
3 showing when they refer to "independent evidence disclosing that
4 plaintiffs have been surveilled" and a "rich lode of disclosure to
5 support their claims" in various of the MDL cases. Doc #440 at 16-
6 17. To proceed with their FISA claim, plaintiffs must present to
7 the court enough specifics based on non-classified evidence to
8 establish their "aggrieved person" status under FISA.

9
10 C

11 It is a testament to the obstacles to seeking civil
12 remedies for alleged violations of FISA that section 1810 has lain
13 "dormant for nearly thirty years." Andrew Adler, Note, The Notice
14 Problem, Unlawful Electronic Surveillance, and Civil Liability
15 Under the Foreign Intelligence Surveillance Act, 61 U Miami L Rev
16 393, 397 (2006-07). Dormant indeed. The print version of the
17 United States Code Annotated contains no case notes under section
18 1810. The parties have cited no other case in which a plaintiff
19 has actually brought suit under section 1810, let alone secured a
20 civil judgment under it. By contrast, the civil liability
21 provisions of Title III, 18 USC § 2520, have been used successfully
22 by "aggrieved persons" with regularity since they were enacted in
23 1968. See, e g, Jacobsen v Bell Telephone Co, 592 F2d 515 (9th Cir
24 1978), Dorris v Absher, 179 F3d 420 (6th Cir 1999).

25 While Congress enacted section 1810 in order to provide a
26 private cause of action for unlawful surveillance, section 1810
27 bears but faint resemblance to 18 USC section 2520. While the
28 court must not interpret and apply FISA in way that renders section

1 1810 superfluous, Dole Food Co v Patrickson, 538 US 468, 476-77
2 (2003), the court must be wary of unwarranted interpretations of
3 FISA that would make section 1810 a more robust remedy than
4 Congress intended it to be. As noted, Title III predated FISA by a
5 full decade. If Congress had so intended, it could have written
6 FISA to offer a more fulsome and accessible remedy patterned on
7 Title III. Congress may therefore be presumed to have intended not
8 to provide such a remedy and the court should not strain to
9 construe FISA in a manner designed to give section 1810 greater
10 effect than Congress intended. See *id.* The same applies with
11 regard to the procedure set forth in 18 USC section 3504(a)(1),
12 enacted in 1970. This is not to say that it is impossible to
13 obtain relief under section 1810, but the fact that no one has ever
14 done so reinforces the court's reading of the plain terms of the
15 statute: section 1810 is not user-friendly and the impediments to
16 using it may yet prove insurmountable.

IV

19 On April 17, 2008, less than a week before the hearing on
20 defendants' second motion to dismiss, plaintiffs filed a motion for
21 an order extending the time to serve defendants Bush, Alexander,
22 Werner and Mueller individually, presumably in response to
23 defendants' sovereign immunity arguments in their moving and reply
24 papers. Doc # 447/30. In that motion, plaintiffs do not
25 specifically state whether they intended to sue defendants in both
26 their official and individual capacities, but they assert that "a
27 nonspecific complaint may be characterized as alleging both
28 official and personal capacity liability." *Id.* at 2. Plaintiffs

1 explain their failure to serve the individual defendants
2 individually within the 120-day deadline for service under Federal
3 Rule of Civil Procedure 4(m) as follows: "Within weeks [of serving
4 their complaint upon the Attorney General] this case became focused
5 on the classified document that Plaintiffs filed under seal with
6 the Complaint." Id at 1. They assert that issues pertaining to
7 the Sealed Document, including defendants' assertion of the state
8 secrets privilege, "have driven this litigation to date in the
9 trial and appellate courts and have overshadowed all other aspects
10 of this case." Id.

11 Plaintiffs also contend that the individual defendants
12 will not be prejudiced by late service of the complaint because:
13 (1) they have been on notice of the litigation either through
14 personal, open participation in the defense (e g, Declaration of
15 NSA Director & Declaration of Keith B Alexander, Al-Haramain, No C
16 06-0274 KI Doc #55-2, 59, United States District Court for the
17 District of Oregon, filed June 21, 2006) or due to the large amount
18 of publicity surrounding these cases and (2) because the case has
19 advanced little due to the courts' focus on the Sealed Document,
20 the state secrets privilege and legal issues under FISA. Doc
21 #447/30 at 2-3.

22 Defendants vigorously oppose plaintiffs' motion,
23 asserting that plaintiffs have failed to establish "good cause"
24 warranting relief from the 120-day deadline. They assert that
25 plaintiffs have been on notice of the defendants' sovereign
26 immunity defense for well over a year and of the particular point
27 that individual defendants had not been served for "at least nine
28 months." Doc # 448/31 at 3. Defendants assert that they will be

1 prejudiced by the proposed late service because the suit has been
2 pending and actively litigated without notice to defendants as
3 individuals for over two years. Id at 5.

4 Defendants also point out—correctly—that plaintiffs’
5 motion is not in accordance with this court’s local rules as it was
6 filed less than one week before the April 23 hearing without a
7 hearing date specified on the moving papers. Defendants filed a
8 short opposition the day before the hearing requesting, inter alia,
9 that the motion be placed on the calendar and briefed in accordance
10 with the local rules.

11 Plaintiffs’ motion mentions Civil Local Rule 6-3 (Doc #
12 447/30 at 1), but does not properly invoke or comply with it. Rule
13 6-3 provides the procedure for obtaining a hearing on shortened
14 time. It requires the filing of a motion to shorten time and sets
15 forth detailed requirements for such a motion. Plaintiffs filed no
16 such motion. On the other hand, plaintiffs did not expressly seek
17 to have their motion heard on shortened time and, at the April 23
18 hearing, it was defendants’ attorney who first sought to be heard
19 on the matter. Hearing transcript, Doc # 452 at 44-45.

20 Notwithstanding the inartful manner in which plaintiffs
21 brought their motion, the court finds the briefing and arguments
22 for and in opposition to plaintiffs’ motion adequate. No further
23 briefing on this matter will be required. Plaintiffs, however, are
24 admonished to review the local rules of this court and to abide by
25 them for the duration of this litigation.

26 Rule 4(m) provides two alternative courses for a court to
27 follow if a plaintiff has failed to serve one or more defendants
28 within the 120-day time limit. As something like 680 days had

1 elapsed between plaintiffs' filing of their action and the date of
2 their motion for an extension of time to serve the individual
3 defendants individually, plaintiffs have indisputably exceeded the
4 120-day limit by a wide margin. Rule 4(m) requires the court to
5 dismiss the action without prejudice against the particular
6 defendants in question "or order that service be made within a
7 specified time." If plaintiff shows good cause for the failure,
8 however, the court "must extend the time for service for an
9 appropriate period." The determinations required to adjudicate the
10 motion for an extension of time to serve defendants are committed
11 to the discretion of the court. Puett v Blandford, 912 F2d 270,
12 273 (9th Cir 1990).

13 The court agrees with plaintiffs that although more than
14 two years have elapsed, little has occurred in the litigation that
15 would prejudice a late-served individual defendant. This is
16 particularly the case given the specific individuals at issue, all
17 of whom are high-level government officials closely and publicly
18 connected to the policies and practices at issue in this
19 litigation. Dismissal on the ground of failure to serve individual
20 defendants would needlessly complicate the litigation and would not
21 advance the interests of justice in this case. Without reaching
22 the question whether plaintiffs have established "good cause" for
23 their failure to serve the individual defendants, the court instead
24 GRANTS the motion to extend time for service. Should plaintiffs
25 choose to amend their complaint in accordance with this order, they
26 may serve all unserved defendants with their amended complaint
27 within fifteen (15) days of filing it with the court.

28 \\\

V

The lack of precedents under section 1810 complicates the task of charting a path forward. The court of appeals reversed the Oregon district court's plan for allowing plaintiffs to proceed with their suit, but did not suggest a way for plaintiffs to proceed without using the Sealed Document. Nonetheless, the court believes that dismissal with prejudice is not appropriate. Accordingly, plaintiffs' FISA claim will be dismissed with leave to amend. Plaintiffs should have the opportunity to amend their claim to establish that they are "aggrieved persons" within the meaning of 50 USC § 1801(k). In the event plaintiffs meet this hurdle, the court will have occasion to consider the treatment of the Sealed Document under section 1806(f) and the significant practical challenges of adjudicating plaintiffs' claim under section 1810.

For the reasons stated herein, plaintiffs' claim under FISA is DISMISSED with leave to amend. Plaintiffs shall have thirty (30) days to amend their complaint in accordance with this order. Should plaintiffs seek to amend their non-FISA claims, they shall do so by means of a noticed motion before this court in accordance with the local rules.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge